Supreme Court, U.S.
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No. _____

In The
Supreme Court of The United States
October Term 1997

JERRON WEST, INC., et al.,
Petitioners,

v.

STATE OF CALIFORNIA
STATE BOARD OF EQUALIZATION, et al.,
Respondents.

Petition For A Writ Of Certiorari
To the United States Court of Appeals
For the Ninth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Whether the United States Court of Appeals for the Ninth Circuit improperly held that the District Court was barred under the Tax Injunction Act, 28 U.S.C. § 1341, from enjoining Respondents, California taxing authorities, from conducting an administrative sales tax hearing at a time when doing so required Petitioners, California sales taxpayers who were also the subject of a federal criminal tax investigation and impending prosecution, to litigate their sales tax case only at the peril of their Fourth Amendment, Fifth Amendment, and due process rights.

Whether the United States Court of Appeals for the Ninth Circuit Court erroneously failed to acknowledge the inapplicability of the Tax Injunction Act in the present situation, where Petitioners only sought to enjoin Respondents' unconstitutional conduct and not the assessment or collection of any California tax.

Whether the United States Court of Appeals for the Ninth Circuit properly held that Petitioners had a "plain, speedy, and efficient" remedy under California law within the meaning of the Tax Injunction Act and this Court's decision in *Rosewell,* even though Respondents had already deprived Petitioners of their sole administrative sales tax hearing by requiring them to litigate only at the peril of their constitutional rights, and even though a California Superior Court in a subsequent refund suit would not have jurisdiction over a substantial portion of Petitioners' evidence, testimony, and records, or any of Petitioners' constitutional claims for that matter.

LIST OF THE PARTIES

Petitioners

Jerron West, Inc., is a California Corporation, dba/J. Hettinger Interiors. Jerry Hettinger and Ronald Smith are individuals.

Respondents

State of California State Board of Equalization, the members of the State of California State Board of Equalization (Johan Klehs, Dean Andal, Ernest J. Dronenburg, Jr., and Brad Sherman) and Kathleen Connell, California State Controller.

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PETITION FOR WRIT OF CERTIORARI

The Petitioner, Jerron West Inc., respectfully requests that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Ninth Circuit in this case.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Ninth Circuit (as amended on January 29, 1998) is reported at *Jerron West, Inc. v. State of California State Board of Equalization,* 129 F.3d 1334 (9th Cir. 1998). A copy of the opinion is reproduced at Apdx A - 3. The opinion and order of the United States District Court for the Northern District of California was filed on August 13, 1996, and was not reported. A copy of the opinion and order is reproduced at Apdx B - 21. The October 1, 1996, opinion and order of the District Court denying Petitioners' motion for reconsideration of the August 13, 1996, order was not reported and is reproduced at Apdx B - 18.

JURISDICTIONAL STATEMENT

On December 8, 1997, the Ninth Circuit Court of Appeals issued its opinion affirming the District Court's August 13, 1996, order dismissing Petitioners' civil rights action for lack of jurisdiction under the Tax Injunction Act, 28 U.S.C. § 1341. The Ninth Circuit subsequently amended its opinion *sua sponte* on January 29, 1998. Apdx A - 3.

On December 30, 1997, Petitioners filed with the Ninth Circuit a Petition for Rehearing and Suggestion for *En Banc* Review of its December 8, 1997, opinion. The Ninth Circuit denied Petitioners' petition for rehearing and rejected their suggestion for a rehearing *en banc* in an order filed

March 3, 1998. Apdx A - 1.

The jurisdiction of this Court to review the judgment and opinion of the Ninth Circuit Court of Appeals is invoked pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

4th Amendment, U.S. Constitution

5th Amendment, U.S. Constitution

14th Amendment, U.S. Constitution

28 U.S.C. §§ 1341, 1343

42 U.S.C. § 1983

Cal.Rev. & T. Code §§6562, 6908(b), 6981

STATEMENT OF THE CASE

Petitioner Jerron West, Inc. (sometimes referred to herein as "the corporation"), is a California corporation in good standing doing business as J. Hettinger Interiors. Petitioners Jerry Hettinger (hereafter "Hettinger"), President, and Ronald Smith (hereafter "Smith"), Vice-President and Secretary, each own 50% of the issued and outstanding stock of Jerron West, Inc. The corporation had numerous other employees.

On May 18, 1993, the N.D. Calif. District Court determined that probable cause existed that tax crimes had been committed by the. The Court issued a search warrant to allow the search of the corporation's premises in Danville, California. The search warrant was executed by Internal Revenue Service (hereafter "IRS") Criminal Investigation Division Agents on May 25, 1993. During the search, a large volume of records was seized from the corporation's premises.

After a lengthy investigation by agents of the IRS Criminal Investigation Division, a Special Agent of the Criminal Investigation Division recommended criminal prosecution at least of Hettinger and Smith as follows: (1) Income tax evasion under 26 U.S.C. § 7201 for the years 1989, 1990, and 1991 for unreported cash sales; (2) Willfully subscribing under penalties of perjury to false income tax returns of Petitioner Jerron West, Inc. [26 U.S.C. §7206(1)] by understating gross cash sales for the years 1989 and 1991; and (3) Conspiring to evade income taxes under 18 U.S.C. §371 for the years 1989, 1990, and 1991.

In August 1993, an auditing agent of the California

State Board of Equalization (hereafter "SBE") completed a sales tax audit of the corporation. On November 29, 1993, the SBE issued its Notice of Determination. The Notice proposed $429,265.72 in sales taxes due, plus interest of $146,549.95, and a civil fraud penalty of $107,316.52, for a total amount due of $683,132.19. Interest continued to accrue to $271,821.16 by August, 1996, for a total of about $804,043.00.[1]

The Notice was issued for April 1, 1989, through March 31, 1993, or the same years -- 1989, 1990, and 1991 -- involved in the federal criminal tax prosecution. Moreover, the same factual issues were involved in both cases (e.g., allegations of unreported gross cash sales). Counsel wrote to officials of the SBE on numerous occasions, beginning on December 29, 1993, requesting a stay of the administrative proceedings until such time as the federal criminal tax case against Petitioners was completely resolved. All of these requests for a stay were denied even though counsel repeatedly informed the SBE that its failure to grant a stay amounted to a denial of Petitioners' constitutional rights.

The SBE set an administrative hearing on Petitioner Jerron West, Inc.'s petition for redetermination of sales tax[2] set out in the audit report for August 21, 1996. Petitioners, in their response to the SBE's Notice of Hearing, attached a supplemental statement which once again requested a stay of

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[1]The State Board of Equalization reduced the sales tax determination to $424,905.32.

[2]*See* Cal. Rev. & T Code §§ 6561-6566.

the. Once again, the SBE denied Petitioners' request for a stay in a letter dated July 9, 1996, on the ground that these federally-protected constitutional rights did not rise to the level of "sufficient justification."

On July 29, 1996, Petitioners filed their Civil Rights Action for Injunction and Declaratory Relief, alleging that Respondents' denial of the stay of the administrative sales tax hearing violated their federally-protected civil rights. In particular, Petitioners alleged Fourth Amendment (right to suppress evidence) and Fifth Amendment (right against self-incrimination) violations. Petitioners also alleged that Respondents' failure to grant the requested stay of the administrative hearing deprived them of due process.

The complaint further alleged that: All of the Petitioners were inextricably intertwined, as the small, closely held corporation speaks and acts through its knowledgeable officers, i.e., Petitioners; that if Petitioners were to appear and testify individually or on behalf of the corporation and introduce books, records, and other evidence before the SBE, then they would be compelled to waive their above federally-protected rights, as well as the corporation's Fourth Amendment Rights and due process rights to suppress the same records, etc. previously seized by the search warrant; that if they did not appear, then the State would prevail by default; amd that in any subsequent sales tax refund suit, Petitioners would be barred under California law from raising or contesting issues involving the sales tax because they could not, due to the exercise of their constitutional rights, raise these issues or provide testimony and documentary evidence

before the SBE at the August 21, 1996, hearing.

On July 29, 1996, Petitioners also filed an Ex Parte Motion for Temporary Restraining Order, Order to Show Cause, Preliminary Injunction, and Expedited Hearing along with supporting papers. The Court denied the motion for a temporary restraining order without a hearing and dismissed the action on the ground that 28 U.S.C. §1341 deprived the Court of jurisdiction, ruling that the statute applied and that Petitioners had a "plain, speedy and efficient remedy" in the form of a California sales tax refund action. Apdx B - 21. On August 23, 1996, Petitioners timely filed a Motion for Reconsideration of the August 13, 1996, order. The Motion was denied in an order dated October 1, 1996. Apdx B - 18. On October 30, 1996, Petitioners filed a timely Notice of Appeal, appealing both the August 13, 1996, and October 1, 1996, orders.

The SBE proceeded with its administrative sales tax hearing on August 21, 1996. Counsel appeared at the hearing on behalf of Petitioner Jerron West, Inc., but was unable to present testimony on behalf of the corporation from Petitioners Hettinger and Smith, and other employees, due to the impending criminal prosecution. The impending criminal prosecution also precluded the presentation and submission of sufficient corporate records, testimony, and other evidence to the SBE. At that time, the Petitioners had no knowledge of when any criminal indictment would be returned, or who would be indicted, because the case was still in the first of

three levels of review in the Treasury.[3]

On September 18, 1996, the SBE issued its Notice of Redetermination, in which it denied Petitioner Jerron West, Inc.'s petition for redetermination of sales tax on the ground that it had not "presented any evidence." Thus, the audit report and the prior Notice of Determination was affirmed.

Petitioners Jerron West, Inc., Hettinger and Smith were subsequently able to obtain suppression of some of the evidence in the criminal prosecution.

As indicated above, on December 8, 1997, the Court issued its opinion (which it subsequently amended on January 29, 1998) affirming the District Court's August 13, 1996, order dismissing Petitioners' civil rights action for lack of jurisdiction under the Tax Injunction Act, 28 U.S.C. § 1341 (sometimes referred to herein as "TIA"). Apdx A - 3. The Court denied Petitioners' petition for rehearing and rejected their suggestion for a rehearing *en banc* in an order filed March 3, 1998. Apdx A - 1.

REASONS FOR GRANTING THE WRIT

1. **The Petition must be granted because the Court, has deprived Petitioners of their civil constitutional rights during the pendency of a criminal investigation and prosecution. This action conflicts with the historical basic constitutional protections that this Court, and**

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[3]As this Court is aware, after the Treasury Department refers a case to the Justice Department and before any indictment is returned, the Assistant Attorney General, Tax Division, must approve. Then the case is sent forward to the local U.S. Attorney.

other federal circuits, have embraced.

The opinion irreconcilably conflicts with the unassailable proposition that a person cannot be compelled to testify in a civil proceeding while there is an impending or ongoing criminal prosecution targeted at that person. *United States v. Kodel,* 397 U.S. 1, 7, 90 S.Ct. 763, 768 (1970). During the pendency of a criminal case, a party to a civil proceeding must, at a very minimum, be afforded the right to a stay of the civil proceeding until the criminal prosecution is over, or until the criminal statute of limitations has run, so as to avoid having to litigate the civil proceeding at the peril of his or her constitutional rights. *See e.g., Shaffer v. United States,* 528 F.2d 920, 922 (4th Cir. 1975) [fashioning procedure to preclude forfeiture of litigant's 5th Amendment rights, thereby allowing the litigation to proceed fairly to judgment]; *Iannelli v. Long,* 487 F.2d 317, 318-19 (3rd Cir. 1973), *cert. denied* 414 U.S. 1040, 94 S.Ct. 541 [deferring further proceedings in the action until conclusion of related criminal proceedings or until applicable statute of limitations had run].

The Court ignored that Petitioners were the subject of a criminal investigation (a search warrant had been issued, boxes of records had been seized, the Petitioners and others were detained, and attempts to interrogate them were made) and impending criminal prosecution involving the same factual issues (e.g., allegations of unreported gross sales) and the same tax periods as those involved in their administrative sales tax proceedings before the SBE. By refusing to grant Petitioners a stay of the hearing on their petition for

redetermination of sales tax liability (Petitioners' **only administrative hearing allowed under California law**), during the criminal review of a prosecution recommendation, the SBE forced Petitioners to make a forbidden choice between civil constitutional rights on the one hand, and the opportunity to produce evidence and testify at the redetermination hearing, which is a jurisdictional condition precedent to any later sales tax refund action, on the other. Petitioners chose to invoke their constitutional rights. As a result, the SBE ruled that Jerron West, Inc. had failed to meet its evidentiary burden of establishing its entitlement to a redetermination different from the original determination based on the audit -- i.e., they ruled that West, Inc. had defaulted. This, Petitioners contended below, was a deprivation of their property without due process of law. Their alleged failure to was based solely on the exercise of their civil rights and constitutional rights, including Petitioners Hettinger and West's right not to incriminate themselves.

The decision in irreconcilable conflict with analogous cases decided in many other federal circuits. *See* for instance *Thomas v. United States*, 531 F.2d 746, 749 (5th Cir. 1976) ["To add to the present certainties of death and taxes the dismissal of every suit for wagering tax refund by every taxpayer who invokes his Fifth Amendment right may be akin to forfeiture."]; *Iannelli*, 487 F.2d at 318-19 [enjoining collection efforts improper under federal tax anti-injunction statute, 26 U.S.C. § 7421, but reasoning same protective result obtained by deferring further proceedings in the action

until the conclusion of related criminal proceeding].

The Courts below failed to address frontally the fundamental issue of Petitioners' aforementioned constitutional dilemma -- namely, the fact that the Petitioners were required to make the forbidden choice between putting on evidence, documents and testimony at the sole administrative hearing available to Jerron West, Inc. under California law (which is a jurisdictional prerequisite to a later refund suit) on one hand, and their constitutional rights on the other.

The corporation was unwilling to waive its 4th Amendment and Due Process Amendment suppressing rights. The officer and directors and employees were unwilling to testify due their fear of incrimination, while the corporation could not compel their testimony. By forcing Petitioners to make this choice, Respondents were acting under color of state law, i.e., they were utilizing otherwise valid procedures to deprive Petitioners of their civil rights. The corporation was unable to compel persons to testify. Both courts focused solely on the very narrow TIA, and relied on inapplicable TIA cases not involving Petitioners' dilemma .

The cases of *Shaffer, Thomas, and Iannelli,* for, example, conflict. Just as in *Thomas,* the SBE forced the Petitioners to "make a choice" between their constitutional rights and their right to a full administrative hearing. A jurisdictional prerequisite to a later refund suit is that all connecting and/or explanatory testimony and records (including testimony and records of third parties) must be provided at the hearing. Petitioners, corporate employees,

and third parties chose to exercise their constitutional rights. As a result, Jerron West, Inc. was deemed to have failed to produce the required testimony, records, and other third-party evidence which they were constitutionally entitled to withhold pending outcome of the criminal case (including a recommendation for a conspiracy charge). Due to their decision to rest on their constitutionally-protected rights, Jerron West, Inc. lost its case before the SBE. The burden of proof before the SBE is shifted onto the taxpayer, who must affirmatively prove not only that the assessment was erroneous but also must go forward and prove any lower figure. Moreover, as indicated above, all other circuits have held that this forbidden choice constitutes a deprivation of property without due process of law. *Thomas*, 531 F.2d at 749. As the court in *Thomas* noted:

> Justice should not countenance the unilateral calculation and assessment of a tax with its strong presumption of correctness, under which the taxpayer's assets are seized and/or liened, unless the taxpayer, shouldering his burden of proof in a judicial proceeding, is free to challenge its **legality**, its basis, its computation, its correctness; otherwise abuses tend do develop and become ingrained.

Id. at 749 (emphasis added). Additionally, the the **use** by Respondents of constitutionally-valid procedures herein was fundamentally unfair.

Along with the forfeiture of Petitioners' constitutional rights as described above, Jerron West, Inc. has also been forced to forfeit its property without the ability to contest the

amounts of the tax assessments at a full administrative hearing.[4] This constitutes a denial of a due process. A due process statutory pre-seizure hearing is guaranteed. Also without a hearing where the evidence and testimony can be provided causes the trial Court to lack jurisdiction over a future refund suit. It is hornbook constitutional law that the "inexorable safeguard of a fair and open hearing" is one of "the rudiments of fair play" and is to be "maintained in its integrity" and assured to every litigant "as a minimum requirement." *Ohio Bell Telephone Co. v. Public Utilities Comm. of Ohio,* 301 U.S. 292, 304-305, 57 S.Ct. 724, 730-31 (1937) (internal citations omitted).

A full and fair hearing is mandatory in administrative adjudicative proceedings before property can be taken. *Londoner v. Denver,* 210 U.S. 373, 385-86, 28 S.Ct. 709, 714 (1908). Additionally, when the tax is fixed by a subordinate body of the state legislature, due process requires a hearing which "in its very essence demands that he who is entitled to it shall have the right to support his allegations by argument, however brief; and, if need be, by proof, however informal." *Londoner, supra* at 386, 28 S.Ct. at 714. Furthermore, where subsequent judicial review of the administrative decision is or may be sought, and where the judicial tribunal "considers both the law and the facts upon the record made below, **and not upon new evidence**" a hearing is required. *Ohio Bell, supra,* at 303, 57 S.Ct. at 730 (emphasis added). *See also*

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[4]The Petitioners have never contested the constitutionality of the California sales tax laws or any of its accompanying procedural rules.

United States v. Florida East Coast R. Co., 410 U.S. 224, 244-45, 93 S.Ct. 810, 820-21 (1973) (distinguishing between rule making where no hearing is required and adjudication of specific facts and law with respect to a specific party, where a hearing is required, citing and discussing the *Londoner* and *Ohio Bell* cases)[5].

Without a hearing, the reviewing judicial tribunal does "not know the particular or evidential facts on which the [administrative state board of equalization or agency] . . . rested its conclusion." *Id.* at 302, 57 S.Ct. at 729. There is hence no fair opportunity to challenge the administrative body's reasoning in the subsequent judicial proceeding. *Id.* at 303, 57 S.Ct. at 730. Moreover, under California law, without an administrative hearing, not only is there no record, but there is also no opportunity to include in the record the required **testimony** from witnesses and experts who may be crucial to the litigant's case. *See Barnes v. State Board of Equalization,* 118 Cal. App.3d 994, 1001 (C.A. 3rd 1981), discussed *infra,* in Reason for Granting the Writ No. 3.

The Court ignored this reality and held that Petitioners were not entitled to a hearing. In lieu of a hearing, the Court stated, Petitioners could instead "submit records and statements in support of [an administrative claim for refund] without jeopardizing their civil rights." *Jerron West, Inc.,* 129 F.3d at 1339. This reasoning is erroneous.

First, at the time the instant suit was filed and

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[5]Under California law the taxpayer has at least Constitutionally guaranteed right to an administrative hearing before seizure. See Cal. Rev. T. Code §6562.

dismissed there had been no indictments and no one knew when an indictment might come. Only the first tier prosecution recommendation within the three-tier review at Treasury had yet taken place. The case had not even been referred to the Justice Department. The IRS cannot try its own prosecutions. *See U.S. v. La Salle Nat. Bank*, 98 S.Ct. 2357, 2365-2367. Second, this reasoning assumes that a statutorily guaranteed pre-seizure hearing can be replaced with a non-hearing surrogate without running afoul of procedural due process. We reiterate that this is patently false. As indicated above, the "inexorable safeguard of a fair and open hearing" is one of "the rudiments of fair play" and is to be "maintained in its integrity" and assured to every litigant "as a minimum requirement." *Ohio Bell, supra,* 301 U.S. at 304-305, 57 S.Ct. at 730-31 (1937). Moreover, a full and fair hearing is mandatory in administrative adjudicative proceedings before property can be taken. *Londoner, supra,* 210 U.S. at 385-86, 28 S.Ct. at 714 (1908). The Ninth Circuit's opinion is therefore in conflict with this Court's above precedent, and that of all Circuits.

The Ninth Circuit also assumed facts not in the record, which was frozen at the time the District Court dismissed the action on August 13, 1996. Apdx A - 3. Both the Courts were required to accept as true all of the facts alleged in Petitioners' pleadings **at the time it dismissed the action,** i.e., the facts existing as of August 13, 1996, and decide the case on that basis. *See Leatherman v. Tarrant County Narcotics Intelligence & Coordination Unit,* 507 U.S. 163, 165, 113 S.Ct. 1160, 1162 (1993). It is incorrect that a future

claim for refund could serve as a surrogate for a full and fair administrative hearing "[i]f the criminal proceedings have concluded by the time [Petitioners] file an administrative claim for a refund." At the time the District Court dismissed Petitioners' action, however, the criminal proceedings were far from being concluded. At the time the instant suit was filed and dismissed, there had been no indictment, and no one knew when an indictment might be returned. Only a criminal investigation and first-tier recommendation within the Treasury (out of three total tiers of review within the Treasury) had been completed. *See United States v. LaSalle National Bank, supra* 437 U.S. at 315, 98 S.Ct. at 2365-2366 (1978).

Here, the criminal prosecution was not even filed until December 12, 1996. Thus, had Petitioners proceeded with an administrative claim for refund at this time, the submission of documents, records, and statements in support thereof would have subjected them to the same constitutional dilemma they were faced with at the August 21, 1996, hearing on their petition for redetermination of sales tax. Namely, they would have been forced to either choose between their above-described constitutional rights or their sales tax refund. The point is that Petitioners' procedural rights under California law in the abstract do not provide them with a "plain, speedy, and efficient" remedy when **not anchored in a realistic time line reality in the record.**

The Petitioners suit was dismissed on August 13, 1996. Little more than a week later, on August 21, 1996, the SBE held its administrative hearing. Under California law,

Jerron West's time for filing a claim for refund was only six (6) months from the date of collection, which generally occurs a right after the redetermination hearing. *See* Cal. Rev. & T Code § 6902. At the time of dismissal, there was no criminal prosecution. No one even knew when an indictment might be returned within the six month period. Accordingly, the abstract right to file a refund claim in the future was absolutely meaningless.

The opinion attempted to sidestep this glaring constitutional dilemma by wishful thinking involving two provisions in California's Revenue & Taxation Code (Cal. Rev. & T Code), §§ 6908(b) and 6981, which allow the SBE to take **unilateral** action to benefit taxpayers in certain instances. We note that in doing this, the Court failed to follow its own precedent. *See Retirement Fund Trust of Plumbing v. Franchise Tax SBE*, 909 F.2d 1266, 1273 (9th Cir. 1990) [A remedy which requires waiting for the state taxing authority to unilaterally take action is not plain, speedy, and efficient because such a remedy cannot be "invoked" by the taxpayer]. Apdx C - 32. Section 6908(b) allows the SBE to defer action on a claim for refund which has been filed if the taxpayer makes a request for such a deferral. The Court wished that even if the criminal proceedings remained pending, Petitioners could still file a claim for refund, obtain a deferral from the SBE, and then present their evidence at the conclusion of the criminal proceedings. *See* 129 F.3d at 1339.

The foregoing reasoning is erroneous. First, we reiterate that for the Court to suggest that the submission of

records pursuant to an administrative claim for refund[6], even one which is deferred, can serve as a surrogate for a full and fair administrative hearing, is simply wrong. *See Ohio Bell and Londoner, supra.* Second, even if a deferred claim were an adequate surrogate for a hearing, it is up to the SBE to decide whether or not to grant one -- there are no guarantees in the statute. Cal. Rev. & T Code § 6908(b). This is to be contrasted with the mandatory language contained in Cal. Rev. & T Code § 6562, which requires the SBE to grant taxpayers a hearing on a petition for redetermination of sales tax when requested (we note that this is the **only guaranteed hearing** provided to taxpayers under California's sales tax administrative procedures):

> If a petition for redetermination is filed within the 30-day period, the board shall reconsider the determination and, if the person has so requested in his petition, **shall grant the person an oral hearing** . . .

(emphasis added). Apdx C- 33.

Third, the Court's reliance upon the discretionary deferral procedure allowed under Cal. Rev. & T Code § 6908(b) flies in the face of the record herein. The record is replete with requests to the SBE for a stay of Petitioners' administrative sales tax hearing pending resolution of their criminal case. These requests were uniformly denied. Why, then, would the SBE possibly be willing to later grant Petitioners a discretionary deferral of action on their claim for

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[6]*See* Cal. Rev. & T. Code §6904.

refund pursuant to Cal. Rev. & T Code § 6908(b) for the **very same reasons they had previously rejected?** Again, at dismissal no one ever knew when the Criminal case would commence, hardly less when it would end. Thus, freeing up evidence and third party testimony. This was a meaningless procedure. The persons were still unwilling to waive their constitutional rights and expose themselves to possible criminal prosecution. This applied to the corporation as well.

Fourth, the discretionary deferral procedure authorized by Cal. Rev. & T Code § 6908(b) authorizes the SBE to require taxpayers to waive their right to interest during the deferral period as a condition of such deferral. But even assuming that such deferral were an adequate surrogate for a full and fair oral hearing (which it clearly is not), the interest charge would itself be unconstitutional as a deprivation of property without due process. The interest here was hundreds of thousands of dollars. Petitioners would effectively be forced to pay interest as a condition to invoking their constitutional rights. Or, stated differently, they could only exercise their constitutional rights at the peril of losing interest. *See Thomas, supra.*

Completing its chain of abstract, hypothetical wishful thinking not anchored in any time reality in the record at the time of dismissal regarding California's sales tax administrative procedures, the Court finally stated that even if the SBE were to deny Petitioners' request for a deferral pursuant to Cal Rev. & T Code § 6908(b), they could still ask the SBE to determine that it had "illegally determined" the assessed taxes, thereby authorizing the SBE to cancel its own

assessment. Cal. Rev. & T Code § 6981. *Jerron West, Inc.*, 129 F.3d at 1339. Again, this discretionary statutory procedure is not substitute for a full and fair administrative hearing. Moreover, the Court's suggestion that the SBE might be inclined to "cancel" its own assessment as "illegal," for the very same constitutional reasons it had previously rejected in connection with their denial of a stay of Petitioners' hearing on their petition for redetermination, is specious at best. This ignores that the SBE intended to keep and punish the Petitioners by keeping Jerron West, Inc. in the Catch-22 situation where it could not bring a refund suit, because it had not submitted third party connection testimony and corporate and third party records. Thus, Jerron West, Inc. falls between the cracks -- a brilliant but unconstitutional use of lawful, constitutional procedures.

The above-described hypothetical journey, not anchored in a time reality at the time of dismissal, through California's sales tax administrative procedures, as set forth in California's Revenue and Taxation Code, only serves to underscore the importance of a full and fair administrative hearing, the need of a stay, and that no speedy remedy existed. We reiterate that Petitioners were entitled to such a hearing or continuance. *See Ohio Bell* and *Londoner, supra.* While California law affords sales taxpayers an administrative hearing, the Court completely sidestepped the fact that **only one such hearing is afforded** -- namely, the hearing in connection with a taxpayer's petition for redetermination of sales tax. *See* Cal. Rev. & T Code § 6562. Apdx C - 33.

As other circuits have recognized, this amounts to a

constitutionally-impermissible dilemma -- a deprivation of a fair hearing, due process, and eventually losing property without due process. *See Shaffer, Thomas,* and *Iannelli, supra.*[7]

2. The opinion fails to acknowledge the inapplicability of the 28 U.S.C. § 1341, in the present case, where Petitioners only seek to stay (or otherwise redress) Respondents' unconstitutional conduct and not the assessment or collection of any tax, or "tax scheme." The opinion conflicts with the U.S. Constitution, this Court's precedent safeguarding individual rights, the intention of Congress, and the authorities in several other circuits.

The opinion below failed to recognize that civil rights violations perpetrated in the realm of an administrative tax hearing are no less protected by the Constitution than those

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[7]Petitioners find it telling, and call this Court's attention to the fact that the SBE was able to obtain for itself an exemption from complying with California's new Administrative Procedures Act (APA). The new APA required for the first time that state administrative agencies and Boards to recognize Federal Constitutional rights. This Act would have provided a real remedy afforded litigants before California's administrative agencies reviewable by the Superior Court under the APA. These procedural acts are not reviewable under civil sales tax refund jurisidction. Please see the June 4, 1997, San Francisco Daily Journal newspaper article on California's new APA, which is lodged herewith as Apdx D - 38.

violations which are made outside the tax realm. Petitioners brought their action in the District Court hereinbelow pursuant to 42 U.S.C. § 1983, alleging that Respondents acted under color of California's lawful and constitutional SBE procedures to deprive them of their constitutional rights. Apdx C - 27.

Respondents' status as the SBE was **entirely incidental** to the constitutional deprivations to which they subjected Petitioners herein. Had they been deprived of their constitutional rights under color of state law by a labor commissioner[8], an insurance commissioner, a park commissioner[10], or even a housing authority[11], there is no question that their action would not have been dismissed.

The above footnote cases, standing alone (i.e., apart from Reason for Granting the Writ No. 3), justified Federal Court jurisdiction and issuance of the writ herein, because in all of the above situations, in the abstract, the litigants had available to them "plain, speedy and efficient" state law remedies. Here, it was the **use** of otherwise valid procedures, not the procedures themselves, that violated Petitioners' civil rights.

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[8]*See, e.g., Berlanti v. Bodman,* 780 F.2d 296 (3rd Cir. 1985).

[9]*See, e.g., Shaw v. Barrett,* 587 F.2d 109 (2d Cir. 1978).

[10]*See, e.g., Williams v. Kansas City, MO,* 205 F.2d 47 (8th Cir. 1953), *cert. denied,* 74 S.Ct. 45.

[11]*See, e.g., Chavez v. City of Santa Fe Housing Authority,* 606 F.2d 282 (10th Cir. 1979); *Swann v. Gastoma Housing Authority,* 675 F.2d 1342 (4th Cir. 1982).

In addition, the Court failed to acknowledge the reasoning adopted in other federal appellate circuits, that there **is in fact** a significant, constitutionally-viable distinction between the situation where a party is challenging the constitutionality of a "tax scheme," as opposed to the situation where a party is challenging violations of Fourth Amendment, Fifth Amendment, and due process rights which do not in any way bear on the constitutionality of a "tax scheme." *See Mom's Inc. v. Weber*, 951 F. Supp. 92 (E.D. Va. 1996), where it is stated:

> First the statute at issue refers to 'enjoining, suspending, or restraining' a State in its tax administration efforts. 28 U.S.C. § 1341. The Court in this case is not being asked to do any of those things. **This is not a case where a plaintiff is challenging a tax assessment** that has been levied against him or questioning the state's tax scheme. Here, **the issue is whether or not Plaintiff's Fourth and Fourteenth Amendment rights under the United States Constitution have been violated.** The Court does not read the cases cited by the State defendants as usurping authority from the federal district courts.

Id. at 93 (emphasis added).

Mom's Inc., followed the earlier decision in *Fulton Market Cold Storage Co. v. Cullerton*, 582 F.2d 1071, 1079 (7th Cir. 1978), which delineated some of the specific types of relief which 28 U.S.C. § 1341 operates to bar. The *Fulton Market* court found that "Section 1341 only bars **certain**

forms of relief; it does not serve to deprive a federal court of jurisdiction of **all** actions merely because the defendant is a state . . . tax official." *Id.* at 1079.

In contrast, the District Court below dismissed the distinction as "wordplay" in its August 13, 1996, order. Apdx B - 21. Therefore, it appears evident that the both courts failed to recognize that Petitioners' constitutional claims came within these general civil rights jurisdictional rules. As observed by the court in *Mom's Inc.*, this Court in *Fair Ass'ment in Real Estate Assoc. v. McNary*, 454 U.S. 100, 102 S.Ct. 177 (1981), continually referred to a state tax scheme in reaching its decision therein. Here, however, as in *Mom's Inc.*, there is no complaint about any "state tax scheme," but the use valid and constitutional hearing procedures under color of state law to violate their constitutional rights. Thus, the Courts are in conflict with the other Circuits and this Court.

Section 1341, is a **very narrow** jurisdictional **withdrawal** statute enacted by Congress under its express powers stated in Art. III, § 1 of the U.S. Constitution. Under this provision and the general power of Congress to legislate under Art. I, § 1, Congress has vested the district courts with broad original jurisdiction over civil rights actions under 42 U.S.C. § 1983. 28 U.S.C. § 1343(a). This jurisdiction is "broad and sweeping." *Lynch v. Household Finance Corporation*, 405 U.S. 538, 543-544 (1972).

In contrast, the TIA withdraws only a very narrow slice of Federal court tax amount jurisdiction, i.e. suits seeking to contest the assessment and/or collection of a tax.

As *Mom's, Inc., supra,* indicates, suits brought to vindicate constitutional rights (other than challenging the tax statute as unconstitutional) simply do not fall within the narrow scope of the TIA. Moreover, the TIA does not *per se* operate to deprive a federal court of jurisdiction over a civil rights action simply because the defendant happens to be a state tax official. *Fulton Market, supra* at 1079.

The language of the TIA is very much narrower than the language contained in 26 U.S.C. § 7421, the federal anti-injunction tax statute applicable within Title 26. That provision withdraws jurisdiction over suits to restrain the "assessment or collection of **any** tax . . . in **any** court by **any** person . . ." (emphasis added). It contains no "plain, speedy and efficient remedy" exception as in the TIA. Yet 26 U.S.C. § 7421 has been held not to apply to bar lawsuits brought to vindicate constitutional rights. *See e.g., The Founding Church of Scientology of Washington, D.C., Inc. v. Director, Federal Bureau of Investigation,* 84-1 U.S.T.C. ¶9468 (D.C. Dist. Col. 1984); *Application of J.W. Schonfeld, Ltd.,* 460 F. Supp. 332 (E.D. Vir. 1978)[12]. Because suits to vindicate constitutional rights are not barred by this broader jurisdictional withdrawal statute, the TIA, which is a much narrower jurisdictional withdrawal statute, cannot possibly

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[12]*Also see Bostwick v. United States*, 521 F.2d 741, 744 (8th Cir. 1975), holding that 26 U.S.C. § 7421 does not oust Title 11 Bankruptcy jurisdiction even when the assessment or collection of federal taxes is enjoined. The Ninth Circuit has adopted this reasoning in *Zook v. United States*, 541 F.2d 220 (9th Cir. 1976). *Also see In re Major Dynamics, Inc.*, 14 B.R. 969 (Bankr. S.D. Ca. 1981); *In re Martin*, 150 B.R. 43, 47 (Bankr. S.D. Ca. 1993).

bar Petitioners' civil rights suit herein.

In *Schonfeld,* the taxpayers sought the return of property illegally seized by the IRS in violation of the Fourth Amendment. 460 F. Supp. at 336. The Court granted the taxpayers' motion to strike the government's defense that the federal anti-injunction tax statute, 26 U.S.C. §7421, barred their suit, and held that the statute did not apply:

> [Petitioners] seek only the return of that property which was seized in violation of the Fourth Amendment. Only the validity of the seizure, **not the petitioners' tax liability,** is at issue here.

Id. (emphasis added). The court reached a similar conclusion with respect to the government's contention that the Declaratory Judgment Act barred Plaintiffs' suit. *Id.* at 338-339.

Similarly, the court in *Church of Scientology* observed:

> Indeed, plaintiff maintains that this action, unlike the cases upon which defendant relies, was instituted not to challenge any specific tax liability **but to vindicate constitutional rights independent of plaintiff's rights as a taxpayer.** In plaintiff's view, the identity of the IRS is **incidental** to the cause of action, and the multiplicity of defendants to which plaintiff's complaint is directed supports that position . . [D]efendant's approach would shield the IRS not only from those plaintiffs seeking to thwart the tax collection process but **also from litigants who do not sue as aggrieved taxpayers and to whom the**

> **availability of a tax refund suit means little.** The protective purpose of the Act does not require total insulation of the IRS from accountability for its actions, and, in this Court's view, such a result would be untenable.

84-1 U.S.T.C. at 84,182 (emphasis added and citation omitted).

Here, Petitioners are in precisely the same situation as the taxpayers in *Church of Scientology*. They are only seeking to vindicate their constitutional rights **independent of their rights as taxpayers.** In this suit, they are not challenging the Constitutionality of the sales tax or the regulation and are not disputing the tax amount at all. *Id.* Accordingly, the TIA simply does not apply to them.

3. The holding that Petitioners have a "plain, speedy, and efficient" state law remedy within the meaning of the Tax Injunction Act (28 U.S.C. § 1341), is inconsistent with this Court's decision in *Rosewell* and misconstrues the relevant California law.

In *Rosewell v. LaSalle National Bank,* 450 U.S. 503, 101 S.Ct. 1221 (1981), this Court held that a state law remedy must meet certain minimal procedural criteria in order to be considered "plain, speedy, and efficient" within the meaning of the Tax Injunction Act (28 U.S.C. § 1341). Specifically, the state law remedy must provide the taxpayer with a "full hearing and judicial determination of the controversy." *Id.* at 513-514, 101 S.Ct. 1228 (*quoting* Senator Bone, the Act's primary sponsor, 81 Cong.Rec. 1416 (1937)).

The opinion below held that California's administrative and judicial sales tax refund procedures afforded Petitioners a "plain, speedy, and efficient" state law remedy within the meaning of the TIA. *See,* 129 F.3d at 1339-1340. In Reason for Granting the Writ No. 1, *supra,* we detailed extensively why Petitioners absolutely do not have a "plain, speedy, and efficient" administrative remedy under California law. As discussed in Reason No. 1, the Respondents' actions have deprived Petitioners of the only administrative hearing to which they are entitled under California law. *See* Cal. Rev. & T Code § 6562. No other California administrative sales tax procedure can serve as a surrogate for this. We reiterate that the "inexorable safeguard of a fair and open hearing" is one of "the rudiments of fair play" and is to be "maintained in its integrity" and assured to every litigant "as a minimum requirement." *Ohio Bell, supra,* 301 U.S. at 304-305, 57 S.Ct. at 730-31 (1937). In addition, a full and fair hearing is mandatory in administrative adjudicative proceedings before property can be taken, especially as here the statute guarantees a prior administrative hearing when requested. *Londoner, supra,* 210 U.S. at 385-86, 28 S.Ct. at 714 (1908).

As to the judicial remedy afforded Petitioners under California law, i.e., a sales tax refund suit in California Superior Court, this is not "plain, speedy, and efficient" under the TIA. Under California law, a Superior Court's jurisdiction over a sales tax refund suit is **conditioned** on the taxpayer's providing to the SBE the evidence, records, and oral testimony underlying the refund claim. To the extent that

such evidence, records, and testimony are not first presented to the SBE while the case is still at the administrative level, the California Superior Court in any subsequent refund suit is jurisdictionally barred from considering them. The California case law on this point, which the Ninth Circuit altogether ignored in its opinion below, is instructive:

> [M]atters of both law **and fact** must first be presented to the board [of equalization] **for adjudication** before resort to the courts so that the board may be afforded the opportunity to rectify any mistake in tax collection. (emphasis added).

Barnes, supra, 118 Cal. App.3d at 1001 (emphasis added)(*quoting* the California Supreme Court in *People v. West Publishing Co.*, 35 Cal.2d 80, 88 (1950)). In *Barnes*, a claim was filed. The SBE specifically requested detailed data and information. It was not provided. The SBE wrote and said if the requests were not honored, a recommendation would be made to the Board to deny the claim. After a recommendation, the SBE denied the claim. The taxpayer sued in Superior Court. The SBE moved for summary judgment to dismiss on jurisdiction. One ground was the failure to exhaust administrative remedies. It was granted on this basis.

> The *Barnes* court went further to observe that:
> We have before us a case of just this sort, in which the courts have said it is particularly important to exhaust all administrative remedies on the merits, both factual and legal. This was not done. Although ample opportunity was given to plaintiff by the board, he

> never responded to the board's request for **factual documentation** of his claim for tax refund. The board was therefore foreclosed from ruling on the factual issues of plaintiff's case and was, in effect, asked by plaintiff to render what amounted to an advisory ruling or decision on various legal issues, including constitutional issues. The board properly refused and denied the claim -- it had no other choice. Plaintiff then approached the superior court and in effect asked again for an advisory ruling on legal and constitutional issues. . . . he was not only vague and non specific, he was **also too late since none of this material had been made available to the board.**
>
> * * *
>
> Taken together the pleadings, declarations and other documents before the trial court showed the court had **no jurisdiction because of plaintiff's refusal to present the factual issues to the SBE so that it could render a decision on the merits** of the tax refund claim. This failure to exhaust the administrative remedy available to plaintiff, **being a jurisdictional bar to court proceedings,** left no issues of fact (or of law) which could be decided by the trial court.

Id. at 1001-02 (emphasis added)(*citing* the California Supreme Court in *Aronoff v. Franchise Tax Board,* 60 Cal.2d 177, 181 (1963)).

As discussed above, no one knew when the criminal prosecution would come. Having some abstract right, not

anchored in a reality time line to add material and testimony when the claim is filed is not a speedy remedy.

Thus, if and when Petitioners later file a sales tax refund suit in California Superior Court, it will be "too late" for them to present the evidence, records, and testimony they were unable to present at the August 21, 1996, administrative hearing due to the exercise of their constitutional rights. *Barnes, supra,* 118 Cal. App.3d at 1002. This is due to the fact that "none of this material [will have] been made available to the board." *Id.* The California Superior Court will lack refund tax jurisdiction over all such evidence. As a result, Petitioners will have been deprived of the "full hearing and judicial determination" to which they are entitled. *Rosewell, supra,* 450 U.S. at 514, 101 S.Ct. at 1230 (1981). This is the Catch 22 situation engineered by the SBE described above. Certainly, this is not the type of "plain, speedy and efficient" remedy that Congress had in mind when it enacted the TIA in 1937. *See Georgia Railroad & Banking Co. v. Redwine,* 342 U.S. 299, 306, 72 S.Ct. 321, 325 (1952); *Retirement Trust of Plumbing v. Franchise Tax Board,* 909 F.2d 1266, ____ (9th Cir. 1990).

While the opinion below cited *Barclays Bank Int'l Ltd. v. Franchise Tax Bd.*, 10 Cal.App.4th 1742, 1749 (1992) for the proposition that a California Superior Court in a sales tax refund suit could "review [Petitioners'] arguments and evidence regarding the allegedly unconstitutional and erroneous tax assessment," this statement is incorrect. 129 F.3d at 1339. *Barclay's* involved a situation where California taxpayers were able to raise their commerce clause and due

process challenges **to the imposition of the tax** (the tax scheme) at issue therein in a refund suit. Here, as Petitioners repeatedly emphasized throughout the proceedings below, Petitioners do not in any way challenge the constitutionality of California's sales tax or any of its accompanying administrative procedures. *Barclay's* and other similar cases are therefore inapposite. A Superior Court lacks jurisdiction in a civil tax refund suit to pass on administrative issues. This would occur under a suit under the State APA. However, the SBE exempted itself.

An action to recover on a claim for refund is in the nature of the common law action for money had and received. *Lewis v. Reynolds,* 284 U.S. 281, 283, 52 S.Ct. 145, 146 (1932). The plaintiff in an action to recover on a claim for refund must show that the contested money belongs to him or her. *Id.* If the contested money was collected pursuant to a tax, then one way for the claimant to establish his or her entitlement to the money is to show that the law pursuant to which the tax was collected is unconstitutional. Since this reduces the amount of taxes owed to zero, the claimant becomes entitled to a return of his or her money. Otherwise, the case is limited to showing that the funds are due to be returned, in whole or in part, or that offsets exist.

This paradigm situation is to be contrasted with the dilemma facing Petitioners herein. As indicated above, Petitioners' constitutional grievances relate solely to the unconstitutional conduct of Respondents, under color of state law, in denying Petitioners a stay of their administrative sales tax hearing. Because this conduct on the part of the SBE in

no way relates to or has any bearing whatsoever upon Petitioners' entitlement to a sales tax refund, a California Superior Court in any subsequent refund suit filed by Jerron West, Inc. would be without jurisdiction to consider Petitioners' Federal constitutional claims concerning administrative abuses under the APA. The speedy remedy is 42 U.S.C. §1983. Petitioners without question do not have a "plain, speedy, and efficient" remedy under California law within the meaning of the Tax Injunction Act. The opinion is in conflict with the other circuits and this Court's decision.

CONCLUSION

For the foregoing reasons, the Petition for Writ of Certiorari should be granted.

Respectfully Submitted

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APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

ORDER DENYING REHEARING
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OPINION
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AMENDED, JANUARY 29, 1998
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UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

JERRON WEST, INC., a California corporation, dba/J. Hettinger Interiors; JERRY HETTINGER, individually; and RONALD SMITH,	)	
Plaintiffs-Appellants,	)	No. 96-17209
v.	)	**ORDER**
STATE OF CALIFORNIA STATE BOARD OF EQUALIZATION; Board of Equalization of California, State of California State Board of Equalization Members; JOHAN KLEHS; DEAN ANDAL; ERNEST J. DRONENBURG, JR.; BRAD SHERMAN; and KATHLEEN CONNELL, State Controller,	)	
Defendants-Appellees.	)	

Before: CHOY, ALARCÓN, and T. G. NELSON, Circuit Judges

The panel as constituted in the above case has voted

unanimously to deny the petition for rehearing. Judge Choy and Alarcón recommend rejection of the suggestion for a rehearing en banc, Judge Nelson has voted to reject the suggestion for a rehearing en banc.

The full court has been advised of the suggestion for an en banc hearing, and no judge of the court has requested a vote on the suggestion for rehearing en banc. Fed. R. App. P. 35(b).

The petition for rehearing is denied and the suggestion for a rehearing en banc is rejected.

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

JERRON WEST, INC., a California corporation, dba/J. Hettinger Interiors; JERRY HETTINGER, individually; and RONALD SMITH, Plaintiffs-Appellants,	)	No. 96-17209
v.	)	
STATE OF CALIFORNIA STATE BOARD OF EQUALIZATION; Board of Equalization of California, State of California State Board of Equalization Members; JOHAN KLEHS; DEAN ANDAL; ERNEST J. DRONENBURG, JR.; BRAD SHERMAN; and KATHLEEN CONNELL, State Controller, Defendants-Appellees.	)	No.CV-96-02687-CAL **ORDER** **AMENDED OPINION**

Appeal from the United States District Court
for the Northern District of California
Charles A. Legge, District Judge, Presiding

Argued and Submitted
November 5, 1997--San Francisco, California

Filed December 8, 1997
Amended January 29, 1998

Before: Herbert Y. C. Choy, Arthur L. Alarcon, and Thomas G. Nelson, Circuit Judges.

Opinion by Judge Alarcon

Plaintiffs-appellants Jerry A. Hettinger, Ronald Smith, and Jerron West, Inc. ("the Corporation") (collectively, "the Taxpayers") appeal the district court's dismissal for lack of jurisdiction of their 42 U.S.C. S 1983 action seeking to enjoin the California State Board of Equalization ("Board") from conducting administrative tax collection proceedings against them for the assessment and collection of state sales tax. We affirm the district court's dismissal because we hold that the Tax Injunction Act, 28 U.S.C. S 1341, divests the federal courts of jurisdiction over this action.

I

Hettinger and Smith are the two principals of the Corporation. Each own 50% of the Corporation's stock. In 1993, an employee left the Corporation and reported allegations of tax evasion by the Taxpayers to the IRS and the Board. Events followed which eventually led the Taxpayers to this court.

In May 1993, a government search of the Corporation's premises under an uncontested, valid warrant resulted in the confiscation of several volumes of records. After a lengthy investigation, the IRS Criminal Investigation Division recommended criminal prosecution of Hettinger and Smith for various income tax violations allegedly committed in 1989, 1990, and 1991. The U.S. Attorney General filed a nine-count information against them on December 12, 1996. On December 16, 1996, Hettinger and Smith were arraigned and entered not guilty pleas. In August 1993, the Board conducted a sales tax audit of the Corporation, and on November 29, 1993, the Board issued a Notice of Determination for the period beginning April 1,1989, and ending March 31, 1993. The notice proposed $ 683,132.19 as the total amount owed for sales taxes due, interest, and civil fraud penalties. On December 29, 1993, the Corporation petitioned the Board for a redetermination, requesting a hearing on the matter. The Corporation also requested a stay of the hearing and any other administrative proceedings until the criminal investigation against Hettinger and Smith had concluded or the federal criminal statute of limitations had expired. The Corporation wrote to the Board on numerous occasions regarding a stay, claiming that a failure to grant it would result in a denial of the Taxpayers' constitutional rights. The Board denied the requests and set the redetermination hearing for August 21, 1996. The Corporation again requested a stay, asserting the same constitutional grounds. The Board again denied its request. On July 29, 1996, the Taxpayers filed a civil rights action for an injunction and declaratory relief in district court alleging that the Board's denial of the

stay requests violated their federally-protected civil rights. Specifically, they alleged the following:

> (1) violation of their Fifth Amendment right against a taking of property without due process of law; (2)violation of their Fifth Amendment right to remain silent and to decline to incriminate themselves; (3) violation of their Fourth Amendment right against illegal searches and seizures; and (4) violation of their post-indictment right to move to suppress evidence under the Federal Rules of Criminal Procedure. The Taxpayers filed an Ex Parte Motion for Temporary Restraining Order, Order to Show Cause, Preliminary Injunction, and Expedited Hearing in the district court. The district court denied the motion for a temporary restraining order and dismissed the action on August 13, 1996. The court determined that the Tax Injunction Act, 28 U.S.C. S 1341, deprived it of jurisdiction because the Taxpayers seek to enjoin, suspend, or restrain state tax proceedings and the Taxpayers had an adequate state remedy. The Taxpayers moved for reconsideration, but the court denied the motion on October 1, 1996. Meanwhile on August 21, 1996, the Board held the redetermination hearing. On September 18, 1996, the Board issued a Notice of Redetermination concluding that the Corporation 1) "has not presented any evidence to show that the retail sales established in the audit computations are excessive; 2)has not presented any evidence to show that certain sales are exempt on the

basis of being made in interstate commerce. "On October 30, 1996, the Taxpayers timely appealed the district court's dismissal.

II

We must first address the Board's assertion that this appeal should be dismissed as moot. The Board contends that the complaint seeks an injunction barring it from conducting the administrative redetermination hearing and proceedings until after the completion of any criminal proceedings. The Board argues that an injunction is now pointless because it conducted the administrative hearing on the Taxpayers' petition for redetermination on August 21, 1996, and issued a notice of denial on September 18, 1996.

[1] A controversy is moot if effective relief cannot be granted. Continental Casualty Co. v. Fibreboard Corp., 4F.3d 777, 778 (9th Cir. 1993). "The question is not whether the precise relief sought at the time the application for an injunction was filed is still available. . . [but] whether there can be any effective relief." Northwest Envtl. Defense Ctr. v. Gordon, 849 F.2d 1241, 1244-45 (9th Cir. 1988). The Board correctly asserts that the complaint seeks an injunction barring the Board from proceeding with the redetermination hearing. However, the complaint also seeks "[a]ny other relief in law or in equity that the Court deems appropriate." Thus, although the district court cannot enjoin proceedings that have already occurred, it still has the power to attempt to fashion an effective remedy to redress the alleged violations. Id. at 1245 (holding that "plaintiffs are not required . . . to have asked for

the precise form of relief that the district court may ultimately grant"). Accordingly, the Taxpayers' action is not moot.

III

The Taxpayers assert that the district court erred in dismissing their complaint for lack of subject matter jurisdiction. A dismissal for lack of subject matter jurisdiction is a question of law reviewed de novo. Evans v. Chater, 110 F.3d 1480,1481 (9th Cir. 1997). The Taxpayers primarily contend that the Tax Injunction Act, 28 U.S.C. S 1341, ("Act") is inapplicable because it is a narrow jurisdictional withdrawal statute that only applies to actions challenging the constitutionality of California's sales tax and its accompanying procedures. They argue that their action is not barred by the Act because they merely seek to vindicate their civil rights by enjoining the Board's unconstitutional conduct. We disagree.

[2] The Act states that "[t]he district courts shall not enjoin, suspend or restrain the assessment, levy or collection of any tax under State law where a plain, speedy and efficient remedy may be had in the courts of such State." 28 U.S.C.S 1341. Based on a plain reading of the statute, the district court does not have jurisdiction over the Taxpayers' action if it seeks district court interference with California's tax assessment and collection process. The only exception is where a state does not provide the Taxpayers with an adequate state remedy. We must first determine whether the Taxpayers seek district court interference with California's tax assessment and collection process as prohibited by the Act.

The relevant portion of California's sales tax assessment procedure is as follows. The Board initially conducts an audit and then issues a notice of its determination. The taxpayer can petition the Board for a redetermination of that assessment. See CAL. REV. & TAX. CODE § 6561.[1] The taxpayer can also request an oral hearing regarding the redetermination. See § 6562. After the redetermination process is complete, the Board issues a notice of its decision, and the assessed amount will become final and collectible 30 days after service of notice. See §§ 6564, 6565. If the taxpayer wishes to further contest the assessment, the taxpayer must pay the tax owed and then file an administrative claim for a refund. See § 6901 et seq. The taxpayer can also file a state court action for a refund after the Board has issued its decision on the refund claim. See § 6933.

[3] The Taxpayers' action in federal district court seeks to enjoin the Board's redetermination hearing and any other proceedings while the threat of federal prosecution is pending. This request falls squarely within the prohibitions of the Act. The assessed tax is not due and collectible until 30 days after the Board has held the redetermination hearing and served its decision. See § 6564. Thus, the hearing and the administrative proceedings that the Taxpayers seek to enjoin in federal court are an integral part of California's sales tax assessment and collection scheme. See §§ 6561-62, 6565.

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[1]Unless otherwise indicated, all section citations refer to the California Revenue and Taxation Code.

[4] Any other form of effective relief from the allegedly unconstitutional assessment would similarly intrude upon and disrupt California's taxation process. As a result, regardless of the Taxpayers' claimed purpose for filing the action, the explicit language of the Act divests jurisdiction from the district court. Surrounding case law also supports the conclusion that the Act bars federal jurisdiction in this case. In Blangeres v. Burlington Northern, Inc., 872 F.2d 327, 328 (9th Cir. 1989), we held that even an indirect restraint on tax assessment would violate the Act. The employees in Blangeres sought to enjoin the production of certain records of earnings by the employer corporation to the state taxing authorities. The Blangeres court reasoned that the requested injunction would preclude the taxing authorities from taxing the employees because the authorities would not have the information necessary to conduct the assessment. Id. Thus, the Act prohibits relief where it would result in a restraint on tax assessment even though achieved indirectly. Id.; see also Comenout v. State of Washington, 722 F.2d 574, 577 (9th Cir. 1983) (holding that the Act may bar claims of unconstitutional arrests, searches, and seizures in addition to injunctive relief, where the gravamen of the complaint involves enforcement of the state tax scheme). The Act has been broadly construed in other contexts as well. For example, in California v. Grace Brethren Church, 457 U.S. 393 (1982), the Supreme Court held that the Act applies to declaratory relief actions despite the absence of explicit language because such actions "may in every practical sense operate to suspend collection of the state taxes." Id. at 408. Likewise, in Marvin F. Poer & Co. v. Counties of Alameda, 725 F.2d 1234 (9th

Cir. 1984), we held that the Act applies to actions for damages or refunds despite the absence of explicit language because federal jurisdiction over state refund actions would "readily circumvent" the Act. Id. at 1236.

[5] The Act "has its roots in equity practice, in principles of federalism, and in recognition of the imperative need of a State to administer its own fiscal operations." Tully v. Griffin, Inc., 429 U.S. 68, 73 (1976). Its primary purpose is to prevent federal court intrusion into state tax collection, an area which deserves the utmost comity to state law and procedure. See e.g., Rosewell v. LaSalle Nat'l Bank, 450 U.S. 503, 522 (1981) (stating that the Act "was first and foremost a vehicle to limit drastically federal district court jurisdiction to interfere with so important a local concern as the collection of taxes") (citing 81 Cong. Rec 1415 (1937)); Great Lakes Dredge & Dock Co. v. Huffman, 319 U.S. 293, 301 (1943)(stating that the Act "was predicated upon the desirability of freeing, from interference by the federal courts, state procedures which authorize litigation challenging a tax only after the tax has been paid"); Dillon v. State of Montana, 634 F.2d463, 466 (9th Cir. 1980) (concluding that the Act "is meant to be a broad jurisdictional impediment to federal court interference with the administration of state tax systems"). For further discussion of the Congressional intent underlying the Act, see Rosewell, 450 U.S. at 522-24, and Capitol Industries EMI, Inc. v. Bennett, 681 F.2d 1107, 1112 n.12 (9th Cir.1982).

The Supreme Court has also held that, irrespective of

the Act, the principle of comity alone would bar federal courts from granting damages relief in state tax cases because such relief would intrude upon and disrupt a state's enforcement of its tax system. Fair Assessment in Real Estate Ass'n, Inc. v. McNary, 454 U.S. 100, 114 (1981); see also, National Private Truck Council v. Oklahoma Tax Comm., 515 U.S. 582, 586(1995) ("We have long recognized that principles of federalism and comity generally counsel that courts should adopt a hands-off approach with respect to state tax administration."). Therefore, because the Taxpayers' action seeks federal court intrusion into California's taxation process, the Act divests the district court of jurisdiction.

IV

[6] While the Act excludes jurisdiction over actions seeking district court intrusion into the state taxation process, the Act provides an exception where there is no adequate state remedy. The Taxpayers contend California does not provide them with an adequate remedy because the state's administrative and judicial remedies are ineffective as applied to their situation. They assert that they were unable to present evidence at the redetermination hearing because doing so would have jeopardized their constitutional rights in the criminal proceedings. The Taxpayers argue that their failure to present "sufficient factual material and testimony" at the redetermination hearing precludes them now from litigating the merits of their constitutional claims or the tax assessment before the Board or in state court.

[7] The Supreme Court and this court have concluded that California's tax refund remedy is generally a "plain, speedy and efficient" remedy under the Act. Franchise Tax Bd. v. Alcan Aluminum, 493 U.S. 331, 338 (1989); Capitol Indus.-EMI, Inc. v. Bennett, 681 F.2d 1107, 1113-14 (9th Cir. 1982). The Taxpayers' failure to present sufficient evidence at the redetermination hearing due to constitutional concerns does not render their state remedies ineffective. The Taxpayers failed to pursue their state administrative remedy ("claim for a refund") or their state judicial remedy ("state refund action"). An administrative claim for a refund must state the specific grounds upon which the claim is based. See § 6904(a). The plain language of § 6904(a) does not limit the claim for a refund to only those issues and evidence presented at the redetermination hearing. See id. It merely states that "[e]very claim shall be in writing and shall state the specific grounds upon which the claim is founded." Id.

[8] Thus, the correct procedure for taxpayers under California law is to file a claim for a refund before the Board. If the criminal proceedings have concluded by the time taxpayers file an administrative claim for a refund, they can submit records and statements in support of the claim without jeopardizing their civil rights. If the criminal proceedings have not concluded by this time, taxpayers can still file a claim for a refund and present their constitutional arguments for a stay of action on the claim until after the criminal proceedings have concluded. See § 6908(b) ("If any person who has filed a claim for refund requests the [B]oard to defer action on the claim, the [B]oard, as a condition to deferring action, may

require the claimant to waive interest for the period during which the person requests the [B]oard to defer action on the claim."). If the Board grants the stay request, then taxpayers can submit their evidence in support of the claim for a refund at the conclusion of the criminal proceedings.

[9] If the Board denies the stay request, taxpayers can proceed with the claim for a refund, asserting that the redetermination hearing was unconstitutional because it was held in violation of their civil rights. The Board has the authority to consider and remedy any alleged errors it previously made in assessing the amount owed. Section 6981 authorizes the Board to cancel assessed amounts that have been "illegally determined . . . by the [B]oard." § 6981. Taxpayers can assert in their claim for a refund that the Board illegally determined the assessed amount by denying taxpayers the right to present material evidence.

[10] Should the Board reject taxpayers' claim for a refund, taxpayers can seek state court review of the Board's rejection. See § 6933; see also § 6932 (stating that a claim for a refund before the Board is a prerequisite to filing any state court action for the "recovery of any amount alleged to have been erroneously or illegally determined or collected"). The issues raised and the evidence presented in the administrative claim for a refund, not the petition for redetermination, frame the issues that may be subsequently litigated in a state refund action. See § 6933 ("Within 90 days after the mailing of the notice of the [B]oard's action upon a [refund] claim . . ., the claimant may bring an action against the [B]oard on the

grounds set forth in the claim."); American Alliance Ins. Co. v. State Bd. of Equalization, 184 Cal. Rptr. 674, 678, 134 Cal.App. 3d 601, 609 (1982) ("The claim for refund thus frames and restricts the issues for litigation."). Therefore, the state court can review taxpayers' arguments and evidence regarding the allegedly unconstitutional and erroneous tax assessment if taxpayers first raised them in their claim for a refund. See e.g., Barclays Bank Int'l Ltd. v. Franchise Tax Bd., 14Cal. Rptr. 2d 537, 540, 10 Cal. App. 4th 1742, 1749 (1992)(holding that the taxpayers sufficiently stated their commerce clause and due process clause challenges in their claim for a refund); Jimmy Swaggart Ministries v. Board of Equalization, 250 Cal. Rptr. 891, 906, 204 Cal. App. 3d 1269, 1291 (1988)(holding that, because the taxpayer raised only the First Amendment violation in the claim for a refund, the other constitutional grounds for a refund could not be litigated in the state refund action); Duffy v. State Bd. of Equalization, 199Cal. Rptr. 886, 889, 152 Cal. App. 3d 1156, 1163 (1984)(holding that the taxpayer sufficiently tendered its unconstitutional vagueness challenge against the Board's regulation in the claim for a refund).

[11] For these reasons, we conclude the Taxpayers' failure to present sufficient evidence at the redetermination stage because of concerns that their constitutional rights in the criminal proceedings would be jeopardized, did not render their otherwise adequate state remedies ineffective.

AFFIRMED

ORDER

Appellants in the above-entitled opinion, Jerron West, Inc., Jerry Hettinger, and Ronald Smith, filed a motion to amend opinion on January 5, 1998. Appellants request the opinion be amended "to reflect the fact that testimony was presented to the board and evidence offered to the extent that the evidence would not result in a waiver of Appellants' constitutional rights." Appellants' motion with respect to this request is DENIED.

For the sake of accuracy, however, the opinion in the above-entitled case filed December 8, 1997 is amended as follows:

Slip op. page 14361, second full paragraph is amended to read:

> Meanwhile on August 21, 1996, the Board held the redetermination hearing. On September 18, 1996, the Board issued a Notice of Redetermination concluding that the Corporation 1) "has not presented any evidence to show that the retail sales established in the audit computations are excessive; 2) . . . has not presented any evidence to show that certain sales are exempt on the basis of being made in interstate commerce."

Slip op. page 14366, eighth line from the top, the sentence

shall read:

> The Taxpayers argue that their failure to present"sufficient factual material and testimony" at the redetermination hearing precludes them now from . . .

Slip op. page 14366, first full paragraph, sixth line, insert the word "sufficient" between "present" and "evidence."

Slip op. page 14368, last paragraph, second line, add the word "sufficient" between "present" and "evidence."

Appellants' request to amend headnote 7 copyrighted by Barclays Law Publishers is also DENIED.

APPENDIX B

UNITED STATES DISTRICT COURT
FOR THE
NORTHERN DISTRICT OF CALIFORNIA

ORDER
FILED, OCTOBER 1, 1996
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ORDER
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UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

JERRON WEST, INC., a California Corporation, dba J. HETTINGER INTERIORS, et al.,	)	
Plaintiffs,	)	No. C 96-2687
CAL		
v.	)	**ORDER**
STATE BOARD OF EQUALIZATION, ET AL.,	)	
Defendants.	)	

I.

In an order dated August 12, 1996, this court dismissed plaintiffs' civil rights action. Plaintiffs have filed a motion under Federal Rule of Civil Procedure 59(e) for an order granting reconsideration of and/or vacating the August 12, 1996 order.

Having reviewed plaintiffs' moving papers and declarations, defendants' opposition, plaintiffs' reply and the applicable authorities, the court finds that oral argument of the motion for reconsideration is not necessary.

II.

A rule 59(e) is appropriate "if the district court (1) is presented with newly discovered evidence, (2) committed

clear error or the initial decision was manifestly unjust, or (3) if there is an intervening change in controlling law. School District No. 1J v. ACandS, Inc., 5 F.3d 1255, 1263 (9th Cir. 1993). In this case, plaintiffs present no new evidence or any change in controlling law. Plaintiffs argue for reconsideration only on the grounds that the court has committed clear error or that the initial decision was manifestly unjust.

III.

In their motion for a temporary restraining order, plaintiffs alleged that the state's failure to stay the administrative hearing pending disposition of the criminal investigation violated their Fifth Amendment rights against self-incrimination and Fourth Amendment rights against unreasonable search and seizure. In the current motion, plaintiffs renew their contention that the Anti-Injunction Act, 28 U.S.C. § 1341, does not apply because they are not seeking to enjoin the assessment and collection of the tax. They contend that they are trying to stop the unconstitutional operation of administrative procedures. The order dated August 12, 1996 dealt explicitly with that argument and rejected it. Plaintiffs' decision to cast their lawsuit in constitutional terms does not mean that the Anti-Injunction Act is inapplicable. Linn v. Chivater, 714 F.2d 1278, 1282 (5th Cir. 1983).

The Federal Anti-Injunction Act states:

> The district courts shall not enjoin, suspend or restrain the assessment, levy or collection of any tax under

> State law where a plain, speedy and efficient remedy may be had in the courts of such State.

28 U.S.C. § 1341.

Plaintiffs seek to enjoin, suspend or restrain a state tax proceeding. This court's jurisdiction thus depends upon whether there is a "plain, speedy and efficient" remedy in the California courts. As this court noted in its order dated August 12, 1996, the United States Supreme Court and Ninth Circuit have ruled that California's administrative and judicial tax refund procedures generally provide a plain, speedy and efficient remedy. Franchise Tax Board v. Alcan Aluminum Ltd., 493 U.S. 331, 338 (1990); California v. Grace Brethren Church, 457 U.S. 393, 413-17 (1982); Capitol Industries-EMI, Inc. v. Bennet, 618 F.2d 1107, 1113 (9th Cir. 1982).

As plaintiffs seek to enjoin a state tax proceeding, and they have available to them a "plain, speedy and efficient" remedy under state law, this court reaffirms its determination that it is without jurisdiction to grant the relief requested.

IV.

For the forgoing reasons, the plaintiffs' motion for reconsideration and/or to vacate this court's order of August 12, 1996 is DENIED.

IT IS SO ORDERED.

Dated: October /s/1 1996

/s/ Charles A. Legge
CHARLES A. LEGGE
United States District Judge

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

JERRON WEST, INC., a California Corporation, dba J. HETTINGER INTERIORS, et al.,	)	
Plaintiffs,	)	No. C 96-2687 CAL
v.	)	ORDER
STATE BOARD OF EQUALIZATION, ET AL.,	)	
Defendants.	)	

Plaintiffs in this § 1983 action are a corporation and its two shareholders. The corporation is the subject of a State of California administrative action to collect unpaid sales taxes. Plaintiffs also allege that they are the subject of a federal criminal tax investigation and that they expect to be indicted this month.

Plaintiffs seek a temporary restraining order to enjoin a hearing in the tax collection action against the corporation. They allege that the state's failure to stay the administrative hearing pending disposition of the criminal investigation violates their Fifth Amendment rights against self-incrimination and Fourth Amendment rights against unreasonable search and seizure.

Having reviewed plaintiffs' moving papers and declarations, defendants' opposition, plaintiffs' reply and the applicable authorities, the court finds that oral argument is not necessary. For the reasons stated below, the application for a temporary restraining order is DENIED and the action is DISMISSED.

I.

Plaintiffs are under investigation for income tax evasion and related offenses for the years 1989 to 1991. Federal agents served a search warrant at plaintiffs' offices, which plaintiffs say they plan to move to suppress on Fourth Amendment grounds. Plaintiffs' counsel states in his declaration that he has been advised to expect a grand jury indictment of his clients this month. Plaintiff Jerron West, Inc., was audited by the California State Board of Equalization ("Board"), which seeks to collect $424,905.32 in unpaid sales taxes for the period April 1, 1989, to March 31, 1993, plus interest and penalties, for a total of $804,043.

The Board set an administrative hearing in the matter for August 21, 1996. Plaintiffs requested that the hearing and the collection matter be stayed pending the disposition of the federal criminal investigation and anticipated indictment. The Board denied the stay.

Plaintiffs argue that the state's failure to stay the hearing forces them to either (1) testify and present evidence, which would waive their Fifth and Fourth Amendment rights; or (2) default on their defense of the state tax action.

II.

Defendants argue that the relief plaintiffs seek is barred by the Federal Anti-Injunction Act, 28 U.S.C. § 1341, and that plaintiffs constitutional rights have not bean violated.

The Federal Anti-Injunction Act states:

> The district courts shall not enjoin, suspend or restrain the assessment, levy or collection of any tax under Sate law where a plain, speedy and efficient remedy may be had in the courts of such state.

28 U.S.C. § 1341.

Plaintiffs seek to enjoin, suspend or restraint a state tax proceeding. This court's jurisdiction thus depends upon whether there is a "plain, speedy and efficient" remedy in the California courts. Plaintiffs argue that there is no plain, speedy and efficient remedy because they cannot raise their constitutional claims at the administrative hearing. Under the California Constitution, the only judicial remedy for tax disputes is a post-payment civil action for a tax refund. Cal. Const., Art. XIII, § 32.

Plaintiffs concede that the superior court may consider their constitutional arguments in a refund action. See Capital EMT, Inc., v. Bennett, 681 F.2d 1107,1116-17 (9th Cir. 1982). However, plaintiffs contend that the superior court's review is limited to the issues and evidence presented at the

administrative level. "By failing [to] raise issues and defenses or offer evidence before the Board, these issues, defenses and evidence are waived, and the refund suit is dismissed if the Superior court denies the constitutional claims." Plaintiff is Memo. at 6:26 to 7:2.

Plaintiffs contend, therefore, that their relief is "uncertain," which requires a finding that the state remedy is not plain, speedy and efficient. See Direct Marketing Assoc.,Inc. v. Bennett, 916 F.2d, 1451, 1453 (9th Cir. 3-990) . The uncertainty referred to by the Direct Marketing court is uncertainty regarding the availability of the remedy. See id., (citing cases). The uncertainty argued here by plaintiffs is of a different variety: the uncertainty of whether they are correct in their constitutional claims.

If plaintiffs are correct,[1] California provides a remedy in that the state courts can vacate an assessment that 15 unconstitutional. By standing on their constitutional claims and declining to offer evidence at the administrative level, plaintiffs risk waiving the right to later present evidence on the merits of the assessments.[2] This risk of being wrong does not

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[1]This court makes no determination of whether defendants' denial of a stay of administrative proceedings violates plaintiffs, constitutional rights.

[2]This quandary is similar to that faced by a defendant sued in another state who believes that she is not subject to jurisdiction in that state's courts. She may (1) appear and litigate the jurisdictional question in the foreign court; or (2) Buffer a default and defend a subsequent collection action on the grounds that the Judgment was invalid for lack of personal jurisdiction. The first option entails the cost of litigating in an inconvenient court. The second entails the risk

qualify as "uncertainty" as meant by the courts interpreting the Anti-Injunction Act.

The Supreme Court and Ninth Circuit have ruled that California's administrative and judicial tax refund procedures generally provide a plain, speedy and efficient remedy. Franchise Tax Board v. Alcan Aluminum Ltd., 493 U.S. 331, 338(1990); California v. Grace Brethren Church., 457 U.S. 393, 413-17 (1982); Capitol Industries-EMI Inc. v. Bennet, 618 F.2d 1107, 1113 (9th Cir. 1982). Plaintiffs have presented no evidence that calls into question the availability of these procedures.

Plaintiffs argue that the Anti-Injunction Act does not apply because they are not seeking to enjoin the assessment and collection of the tax. Rather, they contend that they are trying to stop the unconstitutional operation of administrative procedures. This argument is word play. Plaintiffs filed with the Board a petition for redetermination. In this context, the administrative hearing plaintiffs seek to enjoin is a necessary step in the state's collection of unpaid sales taxes. See Cal. Rev. & Tax Code §§ 6561 et seq.

III.

As plaintiffs seek to enjoin a state tax proceeding, and they have available to them a "plain, speedy and efficient" remedy under state law, this court is without jurisdiction to grant the relief requested. Accordingly, the application for a temporary restraining order is DENIED and the action is

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that she was wrong in her claim regarding lack of jurisdiction.

DISMISSED.

IT IS SO ORDERED.

Dated: August /s/12, 1996

/s/ Charles A. Legge
CHARLES A. LEGGE
United States District Judge

APPENDIX C

CONSTITUTIONAL AND STATUTORY PROVISIONS

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UNITED STATES CODE ANNOTATED
TITLE 42
THE PUBLIC HEALTH AND WELFARE

§ 1983. Civil action for deprivation of rights.

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress, except that in any action brought against a judicial officer for an act or omission taken in such officer's judicial capacity, injunctive relief shall not be granted unless a declaratory decree was violated or declamatory relief was unavailable. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

28 U. S. C. § 1343

§ 1343. Civil rights and elective franchise.

(a) The district courts shall have original jurisdiction of any civil action authorized by law to be commenced by any person:

(1) To recover damages for injury to his person or property, or because of the deprivation of any right or privilege of a citizen of the United States, by any act done in furtherance of any conspiracy mentioned in section 1985 of Title 42;

(2) To recover damages from any person who fails to prevent or to aid in preventing any wrongs mentioned in section 1985 of Title 42 which he had knowledge were about to occur and power to prevent;

(3) To redress the deprivation, under color of any State law, statute, ordinance, regulation, custom or usage, of any right, privilege or immunity secured by the Constitution of the United States or by any Act of Congress providing for equal rights of citizens or of all persons within the jurisdiction of the United States;

(4) To recover damages or to secure equitable or other relief under any Act of Congress providing for the protection of civil rights, including the right to vote.

(b) For purpose of this section--

(1) the District of Columbia shall be considered

to be a State; and

(2) any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

§ 1341. Taxes by States.

The district courts shall not enjoin, suspend or restrain the assessment, levy or collection of any tax under State law where a plain, speedy and efficient remedy may be had in the courts of such state.

§ 7421. Prohibition of suits to restrain assessment or collection.

(a) Tax.--Except as provided in sections 6212(a) and (c), 6213(a), 6225(b), 6246(b), 6672(b), 6694(c), 7426(a) and (b)(1), 7429(b), and 7436, no suit for the purpose of restraining the assessment or collection of any tax shall be maintained in any court by any person, whether or not such person is the person against whom such tax was assessed.

(b) Liability of transferee or fiduciary.--No suit shall be maintained in any court for the purpose of restraining the assessment or collection (pursuant to the provisions of chapter 71) of--

(1) the amount of the liability, at law or in equity, of a transferee of property of a taxpayer in respect of any internal revenue tax, or

(2) the amount of the liability of a fiduciary under section 3713(b) of title 31, United States Code[1] in respect of any such tax.

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[1]So in original. A comma probably should appear here.

§ 6908. Interest; disallowance on overpayment; waiver on deferring claim.

(a) If the board determines that any overpayment has been made intentionally or by reason of carelessness, it shall not allow any interest thereon.

(b) If any person who has filed a claim for refund requests the board to defer action on the claim, the board, as a condition to deferring action, may require the claimant to waive interest for the period during which the person requests the board to defer action on the claim.

§ 6562. Reconsideration; hearing; notice; continuances.

If a petition for redetermination is filed within the 30-day period, the board shall reconsider the determination and, if the person has so requested in his petition, shall grant the person an oral hearing and shall give him 10 days' notice of the time and place of the hearing. The board may continue the hearing from time to time as may be necessary.

§ 6981. Illegal determination of amount; records and certification; cancellation; public records.

If any amount has been illegally determined either by the person filing the return or by the board, the board shall set forth that fact in its records, certify the amount determined to be in excess of the amount legally due and the person against whom the determination was made, and authorize the cancellation of the amount upon the records of the board. Any proposed determination by the board pursuant to this section with respect to an amount in excess of fifty thousand dollars ($50,000) shall be available as a public record for at least 10 days prior to the effective date of that determination.

UNITED STATES CONSTITUTION
AMENDMENT IV--SEARCHES AND SEIZURES

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

UNITED STATES CONSTITUTION
AMENDMENT V

AMENDMENT V--GRAND JURY INDICTMENT FOR CAPITAL CRIMES; DOUBLE JEOPARDY; SELF-INCRIMINATION; DUE PROCESS OF LAW; JUST COMPENSATION FOR PROPERTY

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

UNITED STATES CONSTITUTION
AMENDMENT XIV

AMENDMENT XIV--CITIZENSHIP; PRIVILEGES AND IMMUNITIES; DUE PROCESS; EQUAL PROTECTION; APPORTIONMENT OF REPRESENTATION; DISQUALIFICATION OF OFFICERS; PUBLIC DEBT; ENFORCEMENT

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

APPENDIX D

FOCUS
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STATE AGENCY ADJUDICATIONS AFFECTED BY NEW LAWS JULY 1

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The Practitioner Administrative Law

Up to Date
State Agency Adjudications
Affected by New Laws July 1

By Michael Asimow

Adjudication before California administrative agencies enters a new era on July 1, when Senate Bill 523 becomes effective. The revamped Administrative Procedure Act will affect the practice of every attorney who deals with state agencies.

The act resulted from a study by the California Law Revision Commission that began in 1989 and came to fruition when Gov. Pete Wilson signed SB523 on Oct 15, 1995. Sen. Quentin Kopp, I-San Francisco, carried the bill.

The adjudication provisions of California's existing APA, Government Code Section 11500 et &eq., were enacted in 1945, one year before the federal APA. This law was the first state APA of any significance and was a pioneering effort In many respects, however, the 1945 legislation is badly out of date. For one thing, the adjudicatory provisions of the old APA cover only licensing agencies plus a few others altogether less than 5 percent of the total number of state level adjudications. No administrative procedure law applies across the board to the other 95 percent. In contrast, the new APA

contained in SB523 will apply to adjudications by almost all state agencies -workers' compensation, unemployment insurance, health care, welfare, labor law, environmental law, banking, insurance and numerous others.

The new APA applies to any decision by a state agency of particular applicability in which either a statute or the due process clauses of the federal or state constitution require the agency to conduct an evidentiary hearing. Govt. Code Section 11410.10. Thus the scope of the new APA is quite broad -- considerably broader, for example, than the federal APA.

See generally Asimow "The Influence of the Federal ****** ing law, an ALJ must often resolve a credibility dispute--whether to believe A or B. Suppose the findings in the ALJ's proposed decision are based on believing A and disbelieving B. The agency head can reject the proposed decision and, reviewing a cold record, decide that B, not A, was truthful. On judicial review, the court reviews the agency head's decision; the ALJ's prior decision counts for nothing. *Compton v. Board of Trustees*, 49 Cal-App.3d 150,157-58 (1975).

Under federal law, the Universal Camera doctrine, *Universal Camera Corp. v. NLRB*, 340 U.S. 474 (1951), requires courts to recognize that the administrative law judge, not the agency heads, heard and saw the witnesses. The disagreement over credibility detracts from the substantiality of the evidence supporting the decision. SB523 adopts the *Universal Camera* decision in California Govt. Code Section 11425.50(b). Whether a reviewing court applies the substantial evidence or independent judgment review

standards, it must give great weight to the ALJ's credibility findings, if the ALJ's identified the observed demeanor, manner or attitude of the witness that supported those findings.

Under the bill of rights, these adjudicatory fundamentals will be applied across the board for the first time. Currently in most cases, nothing prohibits ex parte contact between litigants and administrative judges or agency heads. Nothing prohibits agency prosecutors from giving off favors settlement mediation and arbitration bon over adversary struggle but an APA can help by legitimating ADR techniques (to avert their legality being questioned) and encouraging agencies to put in place settlement-facilitating mechanisms.

The APA follows the federal lead: In 1990, Congress amended the federal APA to require agencies to explore and utilize all ADR techniques in all agency functions, including adjudication and rule-making. Until now, however, the legality and propriety of ADR in California administrative law was open to doubt. Some agencies employed settlement judges to facilitate negotiated settlement but this procedure was often not available or was pursued half-heartedly Mediation and arbitration were seldom if ever employed. The new APA broadly validates ADR in administrative adjudication. It provides for settlement on any terms the parties determine are appropriate. Agency heads can delegate the power to approve a settlement to lower level officials In addition, it validates all other ADR methods, assuming both parties agree. It empowers agencies to engage in mediation and either binding or nonbinding arbitration

- **Modernizing the existing APA.** SB523 revamps the existing APA provisions that concern professional licensing, housing and employment discrimination, fair political practices and a few others. Both the new and existing APA provide for hearings conducted by administrative law judges assigned to agencies by the Office of Administrative Hearings. For example, SB523 provides for:

- Resolution of discovery disputes by the ALJ rather than requiring judicial intervention.
- Improvements in subpoena procedure so that material can be inspected California's Procedure Act on California's New Administrative Procedure Act, 32 Tulsa LJ.297 (1996).

SB523 contains three fundamental changes if) existing law. First, it contains an administrative law bill of rights. Second, it Includes a flexibility-enhancing provisions that should make adjudication less costly and adversarial Third it contains numerous amendments to the provisions in the existing APA relating to licensing cases.

- **Bill of rights.** The Administrative Adjudication Bill of Rights, Govt. Code Sections 11425.10 - 11435.65, Includes a series of fundamental protections for private Interests. Among other provisions are the following:

- Notice and opportunity to be heard.
- Prohibition on ex parte contacts with decision-makers.
- Separation of functions between prosecutors and

adjudicators.

- A requirement that an agency state findings and reasons for its decisions.
- Precedent decisions by agencies.
- A requirement that a reviewing court give great weight to the credibility findings of an administrative law judge.

The last provision represents a significant change in California law. Under exist the-record advice to agency adjudicators. Nothing authorizes agencies to adopt precedent decisions without going through the rule-making process. The bill of rights has provisions on each of these points.

- **Flexible decision-making.** SB523 contains new provisions for flexible decision making. Often, administrative adjudications are nearly as formal, as adversarial and as costly as adjudication in court- The goal is to make administrative adjudication more informal and less costly, both to the state and to private litigants. For example, the APA:

- Contains elaborate provisions for all types of alternate dispute resolution.
- Provides for informal hearings without cross-examination where appropriate.
- Allows agencies to give administrative declaratory judgments.
- Allows for use of the telephone and other electronic media in decision-making.

The provisions validating ADR Govt. Code Sections

11415.60, 11420.10 - 11420.30, may have the most far-reaching effect. Most people agree that mechanisms should be in place to facilitate and encourage dispute settlement without formal adjudication. A negotiated settlement is prefer-able in most situations to the costly slow and emotionally exhausting process of adjudication and Judicial review. In this era of backlogged dockets, staggering litigation costs on both the private and public side and diminishing resources available to agencies , ADR takes on enhanced importance.

Agencies and private attorneys cannot be compelled to develop a culture that before the hearing:

- A ban on using penalty guidelines that have not been Properly adopted through rulemaking procedures.
- **Exemptions from SB523.** The Bill of rights and flexibility-enhancing provisions apply across the board to nearly all state level adjudications. However, some important Lint agencies are omitted. The State Board of Equalization, California's lax adjudicating agency, was stripped from the bill by Assembly committee after a 7-6 party line vote. The bill of rights would have had a considerable impact on the board's adjudicating procedures. Reform of California's tax adjudication system will have to await another day. Also omitted from the APA are the Public Utilities Commission the University of California the California State University and College System and the State Bar Court. SB523 is not revolutionary. Fiscal and political constraints prevented the Law Revision Commission from proposing truly major changes in the system of administrative adjudication. Nevertheless,

SB523 is profoundly important to administrative lawyers on either the public or the private side.

Michael Asimow, a professor at UCLA School of Law, was the consultant to the California Law Revision Commission, which drafted SB523 and a follow-up judicial review bill pending in the Legislature.